Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

161

(4)

No. 09-871

IN THE

Supreme Court of the United States

CURR-SPEC PARTNERS, L.P., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

J. WINSTON KRAUSE
Counsel of Record

Krause & Associates LP
504 West 18th Street
Austin, Texas 78701
512-477-6707

CURRY & TAYLOR • 202-393-4141

TABLE OF CONTENTS

Page

INTRODUCTION 1

POINTS IN REPLY 6

CONCLUSION 12

APPENDIX

Relevant Provisions 1a

TABLE OF AUTHORITIES

Page

CASES

AD GLOBAL FUND, LLC V. UNITED STATES, 481 F.3D 1351 (FED. CIR. 2007) 1
ANDANTECH L.L.C. V. COMM'R, 331 F.3D 972 (D.C. CIR. 2003) 1
BOYD V. COMM'R, 101 T.C. 365, 370 (1993) 9
CALLAWAY V. COMMISSIONER, 231 F.3D 106, 117-118 (2D CIR. 2000) 9
CAMBRIDGE RESEARCH & DEV. GROUP V. COMM'R, 97 T.C. 287, 292 (1991) 9
COLUMBIA BUILDING, LTD. V. COMM'R, 98 T.C. 607, 612 (1992) 5
CROWELL V. COMM'R, 102 T.C. 683, 689 (1994) 2
DAVIS V. MICHIGAN DEPT. OF TREASURY, 489 U. S. 803, 809 (1989) 7
GINSBURG V. COMM'R, 127 T.C. 75, 80 (2006) 11
OLSON V. UNITED STATES, 172 F.3D 1311, 1317 (FED. CIR. 1999) 9
PCMG TRADING PARTNERS XX V. COMM'R, 131 T.C. ___, ___ (2008) 4
RHONE-POULENC SURFACTANTS & SPECIALTIES, L.P. V. COMM'R, 114 T.C. 533 (2000) 1
ROBERTS V. COMM'R, 94 T.C. 853, 857 (1990) 11

STATUTES

111 Stat. 1027-1028 4
26 U.S.C. 6216(4) 8
26 U.S.C. 6221 3
26 U.S.C. 6225(a) 2
26 U.S.C. 6226(e) 3
26 U.S.C. 6226(d)(1) 10, 11
26 U.S.C. 6226(f) 3
26 U.S.C. 6229(a) 1

26 U.S.C. 6229(e)(1)(A) 2
26 U.S.C. 6229(e)(1)(B) 2
26 U.S.C. 6229(d) 1
26 U.S.C. 6229(f) 2
26 U.S.C. 6229(h) 3
26 U.S.C. 6230 2
26 U.S.C. 6231(a)(6) 2
26 U.S.C. 6231(b)(1)(C) 2
26 U.S.C. 6501(a) 7
26 U.S.C. 6501(n)(2) 8
26 U.S.C. 6503(a)(1) 8
26 U.S.C. 6504 8

INTRODUCTION

This case involves an erroneous rule of law that violates U.S. Const. art. 1, § 8 and art. III, § 2. First adopted by the Tax Court in a case known as *Rhone-Poulenc*,[1] the D.C. and Federal Circuits[2] adopted this erroneous rule before its adoption by the Fifth Circuit below and widening a split with an increasing number of other circuit courts. Illustrating the fallacy of the *Rhone-Poulenc* reasoning requires familiarity with Congress' tax assessment procedure attributable to partnership items.

A. Tax Assessment Procedure on Partnership Items, including Limitations

Like all other returns, Congress gave the IRS three years to change a partnership tax return with 26 U.S.C. 6229(a). If the IRS issues a final partnership administrative adjustment (an "FPAA") changing a partnership's tax return, 26 U.S.C. 6229(d) suspends the three-year § 6229(a) period during the time "which an action may be brought under section 6226 [i.e., a partnership-level case]...and for one year thereafter."[3] Properly understood, the limitation for assessing tax on partnership items is never less than the three-year period of § 6229(a) which § 6229(d) extends with a timely FPAA and, during that extended period, tax

---

[1] *Rhone-Poulenc Surfactants & Specialties, L.P. v. Comm'r*, 114 T.C. 533 (2000), *appeal dismissed and remanded*, 249 F.3d 175 (3d Cir. 2001).

[2] *Andantech L.L.C. v. Comm'r*, 331 F.3d 972 (D.C. Cir. 2003); *AD Global Fund, LLC v. United States*, 481 F.3d 1351 (Fed. Cir. 2007).

[3] 26 U.S.C. 6229(d).

must assessed against partners on their partnership items.

Because § 6229(d) requires the IRS to issue an FPAA to extend the three-year assessment period of § 6229(a), assessment must be put on hold to give the partnership a chance to respond, hence an extension. No assessment of tax on a partnership item may occur until 150 days after the date of either the IRS' FPAA or a final Tax Court decision, if a § 6226 partnership-level case is brought there.[4] However, "[o]nce partnership-level proceedings are completed, [the IRS] is permitted to assess a 'computational adjustment' [*i.e.*, tax from a partnership item] against a partner without issuing a deficiency notice."[5] The obvious consequence of failing to issue an FPAA during the three-year § 6229(a) assessment period is no tax assessment on partnership items, as is failing to assess tax prior to the end of the assessment period, as extended.

The § 6229(a) period may be extended by agreement either by the partnership as to all partners[6] or by an individual partner as to him alone.[7] The § 6229(a) period also extends as to an individual partner who separately settles[8] with the IRS, or files

---

[4] 26 U.S.C. 6225(a).

[5] 26 U.S.C. 6230 (a)(1); *Crowell v. Comm'r*, 102 T.C. 683, 689 (1994). The term "computational adjustment" means the change in the tax liability of a partner which properly reflects the treatment under this subchapter of a partnership item. 26 U.S.C. 6231(a)(6).

[6] 26 U.S.C. 6229(c)(1)(B).

[7] 26 U.S.C. 6229(c)(1)(A).

[8] 26 U.S.C. 6229(f); 26 U.S.C. 6231(b)(1)(C).

bankruptcy.[9] In 1997, Congress recognized that the periods for assessing tax against individual partners may vary from partner to partner but that such partner would not have standing to assert his limitations defense in a partnership-level case. Consequently, it enacted what is now the last sentence § 6226(d)(1)(B) giving standing rights to individual partners (as opposed to the government), to bring that issue to the court's attention.

B. Jurisdiction and Standing in Partnership-Level Cases

Congress requires that "[t]he tax treatment of any partnership item...shall be determined at the partnership level"[10] and strictly limits the jurisdiction of a court hearing a partnership-level case to "all partnership items of the partnership for the partnership taxable year to which the [FPPA] relates...".[11] To satisfy due process concerns, Congress enacted § 6226(c), which treats every partner as a party to a partnership-level case, and expressly allows them to participate, in order to ensure they have a stake in the outcome thereby binding them to the resulting decision.[12] To reiterate standing, or rather the lack of standing, § 6226(d)(1)(B) denies the standing granted by § 6226(c) to partners whose limitations on assessment have expired. However, none of those provisions relax the partnership-only jurisdictional

---

[9] 26 U.S.C. 6229(h).

[10] 26 U.S.C. 6221.

[11] 26 U.S.C. 6226(f).

[12] 26 U.S.C. 6226(c).

scope of a partnership-level case. And neither did Congress' 1997 amendment of § 6226(d) added by the Taxpayer Relief Act of 1997.[13]

In 1997, Congress recognized that the period for assessing tax against individual partners may vary. By adding what is now the last sentence of § 6226(d)(1)(B), Congress specifically grants an individual partner limited purpose standing to intervene in a partnership proceeding solely to assert his individual limitations defense. While the plain meaning of that sentence grants limited-purpose standing to a partner invoking this provision by making a filing to participate, the Tax Court [14] and the court of appeals, interpret this language as a general exception to § 6226(f) for the government to allege its own facts as to individual partners. Pet. App. 6a. On this point, the Fifth Circuit stands alone with the Tax Court.

C. Curr-Spec's Motions in the Tax Court and Its Decisions

Several misstatements of fact and law made in the Commissioner's Brief in Opposition require addressing. The factual misstatements focus on Curr-Spec's contentions in this appeal and its posture in Tax Court and its misstatement of law relates to misapprehending the result if the courts below had not erred.

---

[13] Pub.L. 105-34, sec. 1239(b), 111 Stat. 1027-1028.

[14] *PCMG Trading Partners XX v. Comm'r*, 131 T.C. ___, ___ (2008) (slip op. at n.9) (2008).

Curr-Spec premised its FPAA statute of limitation defense on the Tax Court's jurisdiction to decide that issue. The Commissioner responded by asking the Tax Court to decide that issue based instead on individual partner limitations under § 6501(a) relying on facts relating to individual partner tax returns. Contrary to the Commissioner's characterization of Curr-Spec's jurisdictional plea as to the entire limitations issue, Re. Opp. 10-11, Curr-Spec asked the Tax Court to strike only the Commissioner's improper allegation on jurisdictional grounds.

The Commissioner misstates the law and contradicts himself by claiming that even if Curr-Spec is right it gains no benefit because the case would be dismissed resulting in affirming the FPAA's adjustments. Res. Opp. 10-12. The remedy sought by Curr-Spec for the untimely FPAA is "that the [Tax] Court enter a decision...that the adjustment of partnership items determined by respondent['s FPAA] is disallowed" because an "order simply dismissing the action would impermissibly bring section 6226 (h) into play,"[15] as the Commissioner argues. Res. Opp. 10-12. If the Tax Court had based the decision solely on the partnership's tax return filing date, the result would be "a complete defense to the FPAA, applicable to all partners"[16] thereby barring assessment against the

---

[15] *Columbia Building, Ltd. v. Comm'r*, 98 T.C. 607, 612 (1992).

[16] This correct understanding of the Commissioner contradicts his contentions elsewhere in his Brief in Opposition that "neither Curr-Spec nor the individual partners would obtain any tangible benefit if this Court were to agree with Curr-Spec's jurisdictional argument." Res. Opp. 10. He reiterated the contention: "even if this Court accepted Curr-Spec's jurisdictional argument, it would

partners for additional tax from partnership items. Res. Opp. 14.

This Court should issue a writ of certiorari for three reasons: first, to correct the erroneous rule of law that improperly expands jurisdiction by judicial interpretation; second, to resolve an uneven split between the large majority of circuit courts that properly require jurisdiction be taken into account in deciding partnership limitations and those few that improperly ignore jurisdiction (see Pet. App. 12-15); and, third, to address the "heads government wins, tails taxpayer loses" result from the selective enforcement of TEFRA jurisdiction. Each year over 3 million entities file partnership returns and their partners, the taxpayers, deserve enforcement of the law as enacted by Congress.

POINTS IN REPLY

The Commissioner's opposition vividly illustrates the flawed use of statutory construction in his limitations analysis, which neglects Congress' statutes to achieve a desired result. The Commissioner also attempts to force a camel through the eye of a needle by arguing, as did the court of appeals, that a special standing provision granted by Congress to individual partners empowers the Tax Court to ignore § 6226(f) in favor of the government.

---

not affect the outcome of the partnership-level proceeding." Res. Opp. 11.

A. Jurisdictional Expansion by a Statutory Construction that Ignores both Jurisdiction and the Balance of the Code Section being Interpreted

The court of appeals held that 26 U.S.C. § 6229(a) does not establish an independent three-year statute of limitations within which an FPAA must be issued, but merely provides a minimum time period that may be extended, but can never shorten, the three-year statute of limitations for assessments contained in 26 U.S.C. 6501(a). Res. Op. 5-6; Pet. App. 6a-10a. This decision purports to decide the "interplay" between those two Code sections but violates one of the most fundamental canons of statutory construction. *See Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"). Those courts err by amputating § 6229(a) from the rest of § 6229 for rigorous analysis and ignoring the rest of that section. The Commissioner reiterates this by writing, at Res. Opp. 7, that "Section 6229(a) identifies no point *after* which assessment becomes impermissible" but ignores § 6229(d), which identifies that very end point if § 6229 is read as a whole.

Congress enacted § 6229, entitled "Period of limitations for making assessments," as a whole to serve as the exclusive statute of limitation for assessing tax from partnership items. It took every opportunity to direct a reader of the Internal Revenue Code to TEFRA in general for tax from partnership items and to § 6229 in particular for limitations on assessments for

partnership items. *See* 26 U.S.C. 6504 ("For limitation period in case of—(11) Assessments of tax attributable to partnership items, see section 6229.") *See also* 26 U.S.C. 6216(4) ("For procedure relating to partnership items, see subchapter C" referring to §§ 6221—6234.); and 26 U.S.C. 6501(n)(2) ("For extension of period in the case of partnership items (as defined in section 6231 (a)(3), see section 6229.").[17]

The Commissioner attempts to distinguish Curr-Spec's cited authority by writing that "[i]n other cases the courts held that the challenged assessments were timely under other provisions..." than § 6229(a). Res. Opp. 9. However, in every case the Commissioner cites in that paragraph, the assessment was timely under some other subsection of § 6229—inadvertently corroborating § 6229 as a whole as the applicable statute of limitation—and none relied on § 6501(a).

Besides ignoring the whole of Congress' Code section and all of its directional indicators pointing to § 6229, the court of appeal's "interplay" argument stands in stark contrast to all courts of appeal that understand the deficiency procedures for partnership items are mutually exclusive to the deficiency procedures for everything else. Properly understood, for tax attributable to "those items [] classified as partnership items, subchapter C [TEFRA] would apply. ...If those items were classified as

---

[17] *See also* 26 U.S.C. 6503(a)(1) ("General Rule: The running of the period of limitations provided in section 6501 or 6502 (or section 6229, but only with respect to a deficiency described in paragraph (2)(A) or (3) of section 6230 (a)) on the making of assessments...shall...be suspended...") (*emphasis added*).

nonpartnership items, then subchapter C could not apply."[18] Moreover, and more specifically, § 6501(a) applies not at all in partnership-level cases.[19]

Lastly, if the "interplay" theory were legally sound it would reconcile with the jurisdictional limits Congress imposed on courts hearing TEFRA partnership-level cases which, generally, must be a partnership item mentioned in the FPAA.[20] None of the court of appeal decisions the Commissioner touts as having adopted the "interplay" theory, Res. Opp. 7, make even a fleeting suggestion that individual partner statute of limitations under § 6501(a) are valid partnership items permitted by § 6226(f). It is the height of sophistry for any party to contend that the secret "interplay" between of § 6229(a) and § 6501(a) remained hidden until discovered in 2000, by a portion of the Tax Court in *Rhone-Poulenc*, over the sharp dissent of six of its more senior judges.

---

[18] *Callaway v. Commissioner*, 231 F.3d 106, 117-118 (2d Cir. 2000); *also see Olson v. United States*, 172 F.3d 1311, 1317 (Fed. Cir. 1999) ("Tax adjustments based upon an 'overpayment attributable to a partnership item (or an affected item)' are not subject to the 'standard' deficiency procedures.")

[19] *Boyd v. Comm'r*, 101 T.C. 365, 370 (1993) ("However, section 6501(a) does not apply to income tax attributable to partnership items. Sec. 6501(o)."); *Cambridge Research & Dev. Group v. Comm'r*, 97 T.C. 287, 292 (1991) ("The general rule of section 6501 (a) does not apply, however, to income tax attributable to partnership items. Sec. 6501 (o)(2), formerly sec. 6501 (n)(2)."). These decisions were rendered much closer in time to Congress' enactment of TEFRA.

[20] The FPAA issued to Curr-Spec mentioned nothing about individual partner tax return filing dates or § 6501(a).

B. Jurisdictional Expansion by Interpreting a Standing Provision, Granted to a Taxpayer/Partner, into a Grant of Jurisdiction to the Government

The court of appeals further held that the Tax Court had jurisdiction pursuant to 26 U.S.C. 6226(d)(1) to consider whether the partners' individual assessment periods under § 6501(a) remained open. Res. Opp. 6; Pet. App. 5a-6a, 16a nn.19 & 20. This is made necessary because individual partners' assessment periods under § 6501(a) cannot, under any plausible theory, square with the jurisdictional limits of § 6226(f). This is the classic case of fitting a round peg into a square hole.

On this point, the Commissioner defends with three arguments: that the FPAA limitations as to the whole partnership is a partnership item, that the issue is not properly presented, and that, in any event, § 6226(d)(1) grants the Tax Court jurisdiction to decide the limitations issue, as to the entire partnership. Regarding the first issue, the parties agree with Curr-Spec's argument in every court in this case that the FPAA limitations are a partnership item.

As to the second contention, Curr-Spec addressed in I.C. *infra* above the Commissioner's misapprehension concerning the Tax Court's jurisdiction to decide the partnership limitations issue, just not based on nonpartnership matters, and his misapprehension concerning the benefit of a correct ruling. Curiously, the Commissioner's misapprehension is only intermittent as elsewhere in his brief, the Commissioner concurs that if FPAA limitations are

determined by the filing date of Curr-Spec's tax return, its limitations defense "would be a complete defense to the FPAA, applicable to all partners." Res. Opp. 14. That is correct, meaning that the FPAA was too late to change Curr-Spec's return as filed, and that the return as filed is final resulting in no increase in tax.[21]

The court of appeal's contention that § 6226(d)(1) grants the Tax Court jurisdiction to decide the partnership's FPAA limitations defense based solely on individual partner limitations might be legally sound if based solely on that portion of the statute the Commissioner quotes. Res. Opp. 11. The Commissioner's selective reading—completely reading out Congress' references to an individual partner who would not have standing to intervene to assert his limitations defense—appears to imply a general grant of jurisdiction. *Id.* The Commissioner's brief omits the language from the last sentence § 6226(d)(1): "Notwithstanding... participate in such action" referring to the party may invoke jurisdiction.

There is not the faintest suggestion that Congress intended to refer to the government as a person who "shall be permitted to participate...solely for the purpose of asserting [a limitations defense] with respect to such person...". The House report explaining the law that existed before the 1997 amendment, reproduced in the Appendix, confirms this. Section 6226(d)(1) grants standing only to an individual partner—and no individual partner intervened in the Tax Court and both courts below determined that

---

[21] *Roberts v. Comm'r*, 94 T.C. 853, 857 (1990); *Ginsburg* v. *Comm'r*, 127 T.C. 75, 80 (2006).

Curr-Spec brought its petition under § 6226(a) on behalf of all partners. Pet. App. 2a & 24a. By attempting to find jurisdiction in § 6226(d)(1) for the Tax Court's decision, the court of appeals commits the sin of *Rhone-Poulenc* by improperly expanding jurisdiction through judicial interpretation, for the government's benefit.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,
J. Winston Krause
KRAUSE & ASSOCIATES LP
504 West 13th Street
Austin, Texas 78701
Tel: 512-477-6707
Fax: 512-477-6708
Attorney for Petitioner
Curr-Spec Partners, LP

APPENDIX

1. 26 U.S.C. 6229 provides in pertinent part:

Period of limitations for making assessments

(a) General rule

Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

* * * * *

(d) Suspension when Secretary makes administrative adjustment

If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended—

(1) for the period during which an action may be brought under section 6226 (and, if a petition is filed under section 6226 with respect to such administrative adjustment, until the decision of the court becomes final), and

(2) for 1 year thereafter.

* * * * *

2. 26 U.S.C. 6226 provides in pertinent part:

(c) Partners treated as parties

If an action is brought under subsection (a) or (b) with respect to a partnership for any partnership taxable year—

(1) each person who was a partner in such partnership at any time during such year shall be treated as a party to such action, and

(2) the court having jurisdiction of such action shall allow each such person to participate in the action.

(d) Partner must have interest in outcome

(1) In order to be party to action

Subsection (c) shall not apply to a partner after the day on which—

(A) the partnership items of such partner for the partnership taxable year became nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, or

(B) the period within which any tax attributable to such partnership items may be assessed against that partner expired.

Notwithstanding subparagraph (B), any person treated under subsection (c) as a party to an action shall be permitted to participate in such action (or file a readjustment petition under subsection (b) or paragraph (2) of this subsection) solely for the purpose of asserting

that the period of limitations for assessing any tax attributable to partnership items has expired with respect to such person, and the court having jurisdiction of such action shall have jurisdiction to consider such assertion.

(2) To file petition

No partner may file a readjustment petition under subsection (b) unless such partner would (after the application of paragraph (1) of this subsection) be treated as a party to the proceeding.

* * * * *

3. Excerpt of H. Rept. 105-148, at 594 (1997), 1997-4 C.B. (Vol. 1) 319, 916.

For a partner other than the Tax Matters Partner to be eligible to file a petition for redetermination of partnership items in any court or to participate in an existing case, the period for assessing any tax attributable to the partnership items of that partner must not have expired. Since such a partner would only be treated as a party to the action if the statute of limitations with respect to them was still open, the law is unclear whether the partner would have standing to assert that the statute of limitations had expired with respect to them. []